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RE ESTATE OF LEE WEE NAM, DECD.; LEE HIOK PING & ORS. v. LEE HIOK TNG & ANOR.

RE ESTATE OF LEE WEE KHENG, DECD.; LEE HIOK PING & ORS. v. LEE HIOK KWEE & ANOR.

[C.A. (Kulasekaram, Sinnathuray & Lai Kew Chai JJ.) September 17, 1981]

[Singapore — Civil Appeal Nos. 94, 95, 96, 97, 98 & 99 of 1980]

Probate and Administration — Administration of estates — Claim against executors for improper management — Fiduciary duties of trustees/beneficiaries — Cestui que trusts — Trustees/beneficiaries not entitled to interim distribution of trust fund until final disposal of claims made against them.

The six appeals in this case were heard together and were dealt with together. The appellants were the sons and grandsons of the late Lee Wee Kheng. They were collectively entitled to 60% of the residuary estate of the Wee Kheng Estate. The other 40% of the residuary estate was bequeathed to the executors of the Wee Kheng estate personally in equal shares. The appellants complained against the said executors for converting monies belonging to the estate to their own use.

In 1927, the deceased Lee Wee Kheng, Lee Wee Nam and Lee Wee Kiat had formed a partnership under the name of Wee Kee Kongsi (the Firm). Lee Wee Nam managed the Firm in the lifetime of Lee Wee Kheng. He continued to do so after the death of Lee Wee Kheng. Lee Wee Nam died in 1964. He appointed the respondents in Civil Appeal Nos. 94, 95 and 96 of 1980 as executors and trustees. After the death of Lee Wee Nam, the Executors of the Lee Wee Nam Estate took over the management of the firm. All the shares owned by the Firm were registered in the name of the Estate of Lee Wee Nam as trustees for and on behalf of the Firm.

As against the Wee Nam Estate, the appellants claimed that Lee Wee Nam in his lifetime and after the death of Lee Wee Kheng had intermeddled and assumed dominion over the assets of the Wee Kheng Estate. The executors of the Wee Nam Estate continued to manage the Firm after the death of Lee Wee Nam. The appellants contended that the executors of the Wee Kheng Estate as well as the estate of Wee Nam had been and were trustees and executors *de son tort*. In those capacities they owed fiduciary duties to the appellants. The appellants contended that both sets of executors had been guilty of serious and persistent breaches of their fiduciary duties and were accordingly liable to damages, accounts and to disgorge all assets and profits which may be traced as owned beneficially by the Wee Kheng Estate.

By three orders made in O.M. Nos. 69, 70 and 71 of 1980 and on the application of the appellants, the United Overseas Bank Ltd. the Overseas Union Bank Ltd. and the Overseas Chinese Banking Corporation Ltd. were respectively restrained until further orders from permitting transfers of shares which were registered in the name of the Wee Nam Estate and beneficially owned by the Firm. The appellants claimed as beneficiaries of the Wee Kheng Estate which was entitled to 9/21 shares of the assets of the Firm. The orders were made on December 1, 1978. By an order made in Suit No. 1401 of 1973 the executors of the Wee Kheng were ordered to take immediate steps to obtain the share certificates and duly executed transfer forms in the banks and distribute them to each of the appellants according to their respective entitlement. After the order was obtained, the appellants applied for the partial discharge of the injunctions obtained by them under the said three Originating Motions.

Seeing that the appellants had obtained in effect an interim distribution of the assets of the Wee Kheng Estate in the Firm, the Executors of the Wee Nam Estate also made three applications under the three Originating Motions for the release and delivery up to the estate of a proportionate number of the shares in the three banks from the injunctions made on December 1, 1978. Similarly the executors of the Wee Kheng Estate also made three applications under the three Originating Motions for the release and delivery up of the proportionate number of shares in the three banks to themselves as beneficiaries of the Wee Kheng Estate.

On October 29, 1980, D'Cotta J. allowed interim distribution of the shares in the three banks to the Wee Nam Estate and the executors of the Wee Kheng Estate in their personal capacities as beneficiaries of the Wee Kheng Estate.

Held, allowing the appeal: (1) all the respondents in these appeals were not in the same position as the appellants. So far as the executors of the Wee Kheng Estate were concerned, they were trustees as well as beneficiaries;

(2) having intermeddled in the assets of the Firm and having asserted dominion over the bank shares of the Firm, the Estate of Wee Nam and the executors of the Wee Nam Estate were trustees of the appellants to whom they owe fiduciary duty;

(3) a trustee/beneficiary cannot obtain an interim distribution of the trust fund until the final disposal of the serious claims made against him;

(4) the Orders made by D'Cotta J. on October 29, 1980 were set aside.

Cases referred to:-

(1) *In re James Seaber* (1837) 3 Cases in Bankruptcy 207, 211; 6 L.J. Bcy. 49.

(2) *In re Rhodesia Goldfields Ltd.* [1910] 1 Ch. 239.

CIVIL APPEALS.

Michael Anthony Bowes Burke-Gaffrey Q.C. (*B. Mohan Singh* with him) for the appellants.

Cheong Yuen Hee for the respondents (C.A. Nos. 94, 95 & 96 of 1980).

Mary de Souza for the respondents (C.A. Nos. 97, 98 & 99 of 1980).

Lai Kew Chai J. (delivering the judgment of the Court): By three orders made on October 29, 1980 under Originating Motions bearing Nos. 69, 70 and 71 of 1978, D'Cotta J. ordered respectively the discharge of the injunctions upon and the transfers of 63,000 shares in United Overseas Bank Limited, 49,400 shares in Overseas Union Bank Limited and 251,700 shares in Overseas Chinese Banking Corporation Limited to the executors of the estate of Lee Wee Nam, deceased ("the Wee Nam Estate"). Against these decisions, the appellants have brought these appeals under Civil Appeals Nos. 94, 95 and 96 of 1980. These appeals may be conveniently dealt with together as one set of appeals.

By three orders also made on the same day in the same Originating Motions, D'Cotta J. also ordered respectively the discharge of the injunctions upon and the transfers of 28,000 shares in United Overseas Bank Limited, 22,000 shares in Overseas Union Bank Limited and 112,000 shares in Overseas Chinese Banking Corporation Limited to Lee Hiok Kwee and Lee Hiok Kher in equal shares and in their capacity as the beneficiaries of the residuary estate of Lee Wee Kheng, deceased ("the Wee Kheng Estate"). They were also at all material times the executors and trustees of the Wee Kheng Estate. Against these orders, the appellants have brought the appeals under Civil Appeal Nos. 97, 98 and 99 of 1980. As the factual matrices and procedural background of all six appeals are somewhat identical, all six appeals were heard together and are dealt with together in this judgment.

The appellants are the sons and grandsons of the late Lee Wee Kheng. They reside in Thailand. They

are collectively entitled to 60% of the residuary estate of the Wee Kheng Estate. The other 40% of the residuary estate was bequeathed to the executors of the Wee Kheng Estate personally in equal shares.

By an agreement in Chinese dated January 31, 1927 (hereinafter referred to as the "Partnership Agreement") Lee Wee Kheng, Lee Wee Nam and Lee Wee Kiat, who were brothers, entered into a partnership to manage the moneylending and other businesses and the properties mentioned therein upon the terms and conditions therein set out under the style and firm name of Wee Kee Kongsi ("the Firm"). The Partnership Agreement provided (*inter alia*) as follows: —

(a) That the capital assets and profits of the Firm should be held by and belong to the following in the shares set out against their respective names:—

Lee Wee Kheng	4½ shares
Lee Wee Nam	4 shares
Lee Wee Kiat	3 shares
Sze Teck Tng Chye Kee	2 shares

(b) That in 1927 the three brothers had "agreed to amalgamate" their assets and businesses under the Firm with its place of business at No. 17 New Bridge Road, Singapore, and that the assets and businesses were described in 22 items set out in the Partnership Agreement.

Lee Wee Kiat died on May 6, 1927 and his estate on October 22, 1940 withdrew from the Firm. After the withdrawal, the assets and profits of the Firm were from October 22, 1940 held in the following shares: —

Lee Wee Kheng	9/21 shares
Lee Wee Nam	8/21 shares
Sze Teck Tng Chye Kee	4/21 shares

For the purpose of these appeals, it has been considered by all parties that it is unnecessary to determine the nature and beneficial owners of the entity described as "Sze Teck Tng Chye Kee".

Lee Wee Kheng died on July 18, 1962. By his Will made on December 12, 1961 he appointed Lee Hiok Kwee and Lee Hiok Kher to be the executors and trustees thereof. The testator directed that distribution shall take place 5 years from his death. Probate of the Will of Lee Wee Kheng was granted on September 17, 1962 in Probate No. 519 of 1962 but the said Grant of Probate was extracted only on April 3, 1975.

Lee Wee Nam managed the Firm in the lifetime of Lee Wee Kheng. He continued to do so after the death of Lee Wee Kheng. Lee Wee Nam died on January 22, 1964. By his Will dated March 2, 1961, he appointed the respondents in Civil Appeal Nos. 94, 95 and 96 of 1980 as the executors and trustees. There was some 11 years' delay in extracting the Grant of Probate. Although probate was granted on April 30, 1964, the said Grant of Probate was extracted only on August 20, 1975.

After the death of Lee Wee Nam, the executors of the Wee Nam Estate took over the management of the Firm. They have disclosed that the Firm beneficially owned shares in four insurance companies and two firms and also the following shares in three banks which are public companies listed on the Stock Exchange of Singapore: —

(a) As at 12/6/1976, 1,261,980 shares of $1.00 each in Overseas Chinese Banking Corporation Limited;

(b) As at 17/1/1977, 1,067,220 shares of $1.00 each in United Overseas Bank Limited; and

(c) As at 12/9/1978, 224,200 shares of $1.00 each in Overseas Union Bank Limited.

All the shares were registered in the name of the estate of Lee Wee Nam as trustee for and on behalf of the Firm.

By 1973 the Wee Kheng Estate was not even administered. The appellants made the following specific complaints. The executors of the estate had not ascertained the assets. They had not got in the assets. They did not account to the appellants who are the beneficiaries. They were not ready with full and complete information on the estate which it was their duty to obtain and provide. They have not distributed the estate, although they accepted the office 19 years ago. This unsatisfactory state of affairs prompted the appellants, as they alleged, to commence an administration action in these courts under Suit No. 1401 of 1973. Although the appellants have yet to receive the accounts ordered as early as October 26, 1973 by Choor Singh J., the suit at least compelled the executors of Wee Kheng Estate to settle and pay for the Estate Duty, the delay of which, the appellants alleged, has caused loss to the Estate which had to pay to the Commissioner of Estate Duties the sum of $150,155.08 by way of additional levies. The appellants have also alleged that the executors of the Wee Kheng Estate had converted to their own use the sum of $100,000 which Lee Wee Kheng had given to them in his lifetime for the purpose of paying for funeral expenses and estate duty. They also allege that they had converted to their own use the sum of $200,000 cash belonging to the Wee Kheng Estate which the executors of the Wee Kheng Estate had taken from a safe deposit box in a bank.

As against the Wee Nam Estate, the appellants have asserted that Lee Wee Nam in his lifetime and after the death of Lee Wee Kheng had intermeddled and assumed dominion over the assets of the Wee Kheng Estate. The executors of the Wee Nam Estate continued to manage the Firm after the death of Lee Wee Nam. The appellants therefore contend that the executors of the Wee Kheng Estate as well as the estate of Wee Nam have been and are trustees and executors *de son tort* and, in those capacities, they owe fiduciary duties to the appellants. The appellants also contend that both sets of executors had been guilty of serious and persistent breaches of their fiduciary duties and are accordingly liable to damages, accounts and to disgorge all assets and profits which may be traced as owned beneficially by the Wee Kheng Estate.

The appellants have also claimed that Lee Wee Nam after the death of Lee Wee Kheng had concealed and converted a large number of the shares and landed properties of the Firm. These assets, they claim, were secretly transferred to two Lee Wee Nam family companies. They allege that $3,034,700 and

$100,000 which belonged to the Firm were wrongfully converted and capitalised in Lee Hiok Kee Pte. Ltd. and Lee Investments Pte. Ltd. which were engaged in the same lines of business as those of the Firm. The shareholders of both companies are descendants of Lee Wee Nam.

These allegations were made by the appellants against the trustees of the Wee Kheng Estate in Suit 1401 of 1973. But the executors of the Wee Nam Estate are not parties to those proceedings. Since the orders made by D'Cotta J., against which these appeals are brought, the appellants have commenced proceedings against the executors of both the estates in Suit No. 2457 of 1981 under which the allegations should be dealt with and finally disposed of.

In these appeals, we ought not and we are not making any findings on the merits or otherwise of the allegations we have mentioned. But for the purposes of these appeals, it is sufficient to say that the allegations against the trustees of both estates are of a very serious character. It is without doubt that the administration of the Wee Kheng Estate has taken far too long. It is also not in controversy that Lee Wee Nam in his lifetime and the executors of the Wee Nam Estate have been managing and have been exercising dominion over the assets of the Firm.

Towards the end of 1978 the assets of the Firm which included substantial shares in three Banks were still registered in the name of the Wee Nam Estate. This situation was unacceptable to the appellants. They set out to restrain any dealings of those shares. Later, they also sought an interim distribution to themselves of the shares to which they were entitled.

By three orders made in Originating Motions 69, 70 and 71 of 1980 and on the applications of the appellants, the United Overseas Bank Limited, the Overseas Union Bank Limited and the Overseas Chinese Banking Corporation Limited were respectively restrained until further orders from permitting the transfers of the aforesaid 1,067,220 shares, 244,200 shares and 1,261,980 shares. Those shares were registered in the name of the Wee Nam Estate. But they were beneficially owned by the Firm. The applications were made under Order 50 sub-rule 14(1) of the Rules of the Supreme Court, 1970. The appellants claimed as beneficiaries of the Wee Kheng Estate which was entitled to 9/21 shares of the assets of the Firm. The orders were made on December 1, 1978.

By an order made by the Honourable Chief Justice in Suit No. 1401 of 1973 the executors of the Wee Kheng Estate were ordered to take immediate steps to obtain the share certificates and duly executed transfer forms in respect of half of some undisputed shares in the three banks which were admittedly owned by the Wee Kheng Estate and distribute them to each of the appellants according to their respective entitlement. In effect, the appellants obtained an interim distribution of 42,600 shares in United Overseas Bank Limited, 33,600 shares in Overseas Union Bank Limited and 169,800 shares in Overseas Chinese Banking Corporation Limited. After some delay which the appellants say was due to the delaying tactics of the executors of the Wee Kheng Estate, the appellants finally received the shares in the proportions of their respective entitlements as beneficiaries of the Wee Kheng Estate. After the order was obtained, the appellants applied as a matter of formality for the partial discharge of the injunctions obtained by them under the aforesaid three Originating Motions.

Seeing that the appellants had obtained in effect an interim distribution of the assets of the Wee Kheng Estate in the Firm, the executors of the Wee Nam Estate also made three applications under the three Originating Motions for the release and delivery up to the estate of a proportionate number of the shares in the three banks from the injunctions made on December 1, 1978. Similarly, the executors of the Wee Kheng Estate also made three applications under the three Originating Motions for the release and delivery up of the proportionate number of shares in the three banks to themselves equally as beneficiaries of the Wee Kheng Estate. On October 29, 1980 D'Cotta J. made six orders in terms of the applications which in effect also ordered interim distribution of the shares in the three banks to the Wee Nam Estate and the executors of the Wee Kheng Estate in their personal capacities as beneficiaries of the Wee Kheng Estate. The orders were made presumably on the footing that since the Wee Nam Estate and the executors of the Wee Kheng Estate were in the same position as the appellants, they were also entitled to the partial discharge of the injunction to enable them to receive their respective proportions of the shares in the three banks.

In these appeals, it was canvassed on behalf of the appellants and we accept the contention that all the respondents in these appeals are not in the same position as the appellants. So far as the executors of the Wee Kheng Estate are concerned, they are trustees as well as beneficiaries. As far as the Wee Nam Estate and its personal representatives are concerned, the position is this. Having intermeddled in the assets of the Firm and having asserted dominion over the bank shares of the Firm, the estate of Wee Nam and the executors of the Wee Nam Estate were trustees of the appellants to whom they owe fiduciary duties. Erskine C.J. in *re James Seaber*[1] said: —

> "It is a clear rule in equity, that where a party is found in possession of, and exercising dominion over, trust property, knowing it to be so — unless he can show some other character, to which his act can be properly referred, — he is always held responsible to the *cestuis que trust*, in the same manner as if he had been duly appointed a trustee, in respect of the property over which he has assumed the dominion."

We also accept the appellants' contention that a trustee/beneficiary cannot obtain an interim distribution of the trust fund until the final disposal of the serious claims made against him. The facts in these appeals bear a striking resemblance to those which arose in *In re Rhodesia Goldfields Limited.*[2] The question which fell for determination was whether upon payment out of court to the debenture stockholders of the amounts owing to them upon a distribution of the funds realised in the action the court ought to retain for the time being the amounts appearing to be due to one Partridge. Partridge was a director of the company. He was also one of the trustees of the debenture stockholders. There were

serious claims against him in pending proceedings, which included moneys actually belonging to the company. The claims were disputed and would have to be established. Swinfen Eady J. refused to make the distribution. He set out the principle at page 247 which we would respectfully follow: —

"In my judgment the rule is of general application that where an estate is being administered by the court, or where a fund is being distributed, a party cannot take anything out of the fund until he has made good what he owes to the fund. It is immaterial whether the amount is actually ascertained or not. If it is not actually ascertained it must be ascertained in order that the rights of the parties may be adjusted, and it would be a strange travesty of equity to hold that in distributing the fund Partridge was entitled to be paid at once all that was due to him out of the company's money, and subsequently to find, after it had been established that he owed money to the fund, that the amount could not be recovered from him."

We accordingly allow the appeals with costs here and below. The orders made by D'Cotta J. on October 29, 1980 are set aside.

Appeals allowed.

Solicitors: *B. Mohan Singh & Co.; Goh, Chan & Co.; J.B. Jeyaretnam & Co.*

C.B.H. v. COMPTROLLER OF INCOME TAX

[C.A. (Wee Chong Jin C.J., Lai Kew Chai & Chua JJ.) October 22, 1981]

[Singapore — Civil Appeal No. 59 of 1981]

Revenue Law — Income Tax — Appeal against assessments — Whether gains from trade of property developer — Income Tax Act (Cap. 114), 10(1)(a).

The Comptroller of Income Tax by his additional assessments of July 27, 1972 assessed the appellant liable to tax in the sums of $82,127.14 and $179,146.60 for the years of assessment 1966 and 1968. The assessments were in respect of the appellant's income earned from his trade as a property developer and dealer and exigible under section 10(1)(a) of the Income Tax Act (Cap. 114). The Income Tax Board of Review affirmed the two additional assessments. The appellant's appeal against the Board's decision was dismissed by the High Court. The appellant appealed against the said decision of the High Court.

Held, dismissing the appeal: (1) the proper test to apply in this appeal is to ask whether the Board had misdirected itself in law, or had proceeded without sufficient evidence in law to justify its conclusion;

(2) in finding that the appellant was not holding the two pieces of land as investments in 1963 to 1966, the Board was in effect saying that the appellant was carrying on the trade of dealing with land, and was seeking planning permissions to enhance the eventual realised prices of those parcels. On these facts, it could not be said that the Board's finding was erroneous in law or based on insufficient evidence and therefore the Board's finding could not be upset on appeal.

Cases referred to:

(1) *International Investment Ltd.* v. *Comptroller-General of Inland Revenue* [1979] 1 M.L.J. 4.

(2) *Edwards* v. *Bairstow* (1955) 36 T.C. 207, 229.

CIVIL APPEAL.

Lim Chor Pee for the appellant.

Nand Singh Gandhi (Legal Officer) for the respondent.

Cur. Adv. Vult.

Lai Kew Chai J. (delivering the judgment of the Court): The Comptroller of Income Tax by his additional assessments dated July 27, 1972 assessed the appellant liable to tax in the sums of $82,127.14 and $179,146.60 for the years of assessment 1966 and 1968. The assessments were in respect of the appellant's income earned from his trade as a property developer and dealer and exigible under section 10(1)(a) of the Income Tax Act, Cap. 114. The Income Tax Board of Review affirmed the two additional assessments. The appellant brought an appeal against the Board's decision to the High Court under section 81 of the Act. The learned judge in dismissing the appeal with costs expressed the view, after a careful consideration of the evidence and the grounds of decision of the Board, that there was ample evidence before the Board to justify its decision that the Comptroller was correct in raising the two additional assessments.

Against this decision, this appeal is brought before us.

The issue before the Board was whether the appellant's gains or profits of $177,174 and $360,591 earned in Singapore in 1965 and 1967 as a result of the sales of two portions of a larger piece of land which the appellant had bought in 1949 were gains or profits from the trade of a property developer and dealer within the meaning of section 10(1)(a) of the Act. On this question, the Board in its oral judgment concluded: "As to the issue whether the sale of the two properties was in the course of the appellant carrying out a trade or business in dealing with land, the answer is in the affirmative".

The proper test to apply in this appeal is to ask ourselves whether the Board had misdirected itself in law, or had proceeded without sufficient evidence in law to justify its conclusion. This approach was endorsed by the Privy Council in *International Investment Ltd.* v. *Comptroller-General of Inland Revenue.*[1] It is also a summary of what Lord Radcliffe said in *Edwards* v. *Bairstow*[2]:

"I think that the true position of the court in all these cases can be shortly stated. If a party to a hearing before Commissioners expresses dissatisfaction with their determination as being erroneous in point of law, it is for them to state a case and in the body of it to set out the facts that they have found as well as their determination. I do not think that inferences drawn from other facts are incapable of being themselves findings of fact, although there is value in the distinction between primary facts and inferences drawn from them. When the case comes before the court, it is its duty to examine the determination having regard to its knowledge of the relevant law. If the case contains anything *ex facie* which is bad law and which bears upon the determination, it is, obviously erroneous in point of law. But, without any such misconception appearing *ex facie*, it may be that the facts found are such that no person acting judicially and properly instructed as to the relevant law could have come to the determination under appeal. In those circumstances, too, the court must intervene. It has no option but to assume that there has been some misconception of the law and that this has been responsible for the determination. So there, too, there has been error in point of law. I do not think that it much matters whether this state of affairs is described as one in which there is no evidence to support the determination or as one in which the evidence is inconsistent with and contradictory of the determination or as one in which the true and only reasonable conclusion contradicts the determination. Rightly understood, each phrase propounds the same test. For my part, I prefer the last of the three, since I think that it is rather misleading to speak of